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D.K., Appellant)	
)	
and)	Docket No. 21-0885
)	Issued: January 14, 2022
U.S. POSTAL SERVICE, WEBB BRIDGE POST)	
OFFICE, Alpharetta, GA, Employer)	
)	

Wayne Johnson, Esq., for the appellant¹
Office of Solicitor, for the Director

ORDER REMANDING CASE

Before:

ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

On May 23, 2021 appellant, through counsel, filed a timely appeal from a November 24, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards docketed the appeal as No. 21-0885.

On September 6, 2016 appellant, then a 53-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that, on September 5, 2016, he injured his left shoulder when trying to catch a falling parcel while in the performance of duty. OWCP accepted the claim for strain of muscle, fascia, and tendon of the lower back, and impingement syndrome of the left shoulder. Appellant underwent left shoulder arthroscopic rotator cuff repair, distal clavicle excision, open biceps tenodesis, and subacromial decompression on February 27, 2017. On April 12, 2017 OWCP authorized appellant's left shoulder rotator cuff repair and left biceps tendon repair. It paid appellant appropriate wage-loss compensation on its supplemental and periodic rolls from October 21, 2016 through May 17, 2018.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on an appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

In a January 31, 2018 report, Dr. Douglas H. Murray, a Board-certified orthopedic surgeon, utilized the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)² and opined that appellant had 14 percent permanent impairment of the left upper extremity.

On July 17, 2018 appellant filed a claim for compensation (Form CA-7) for a schedule award.

By decision dated January 22, 2019, OWCP denied appellant's claim for a schedule award, finding that there was no medical evidence to establish that he sustained permanent impairment to a scheduled member or function of the body due to the accepted September 5, 2016 employment injury.

On February 21, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on June 7, 2019. The hearing representative held the record open for 30 days. No further evidence was received.

By decision dated August 19, 2019, the hearing representative affirmed OWCP's January 22, 2019 decision.

On August 19, 2020 appellant, through counsel, requested reconsideration.

OWCP thereafter received a May 31, 2019 medical report, from Dr. Ralph D'Auria, a Board-certified physiatrist. Dr. D'Auria provided a history of appellant's September 5, 2016 employment injury and reviewed the chronological history of appellant's left shoulder medical treatment. He reported findings from appellant's November 3, 2016 left shoulder magnetic resonance imaging (MRI) scan and January 10, 2018 MRI scan. He opined that the MRI scan for the left shoulder was reached on January 31, 2018. Dr. D'Auria provided examination findings of appellant's left shoulder, including three range of motion (ROM) measurements for left shoulder abduction, adduction, flexion, extension, and internal rotation, (which was reported as full at 180 degrees, 50 degrees, 180 degrees, 50 degrees, and 90 degrees, respectively) but with external rotation limited at 45 degrees. Under Table 15-5, page 404 of the A.M.A., *Guides*, he opined that appellant had five percent diagnosis-based impairment (DBI) of the left upper extremity due to his superior labrum anterior posterior (SLAP) tear of the left shoulder. Dr. D'Auria did not rate appellant's left shoulder permanent impairment based on his ROM findings.

By decision dated November 24, 2020, OWCP denied modification of the January 22, 2019 decision. It found that appellant's claim was not approved for left shoulder labral tear and no medical evidence had been received which indicated that he had sustained either a temporary or permanent aggravation of the SLAP tear as a result of the September 5, 2016 traumatic injury.

The Board has duly considered this matter and finds that this case is not in posture for decision as OWCP failed to properly develop appellant's schedule award claim.

Appellant submitted a May 31, 2019 permanent impairment evaluation report from Dr. D'Auria, who opined that appellant had five percent permanent impairment of the left upper

² A.M.A., *Guides* (5th ed. 2001).

extremity due to a diagnosis of SLAP tear of the left shoulder. OWCP denied the schedule award claim on the basis that it had not accepted that the SLAP tear of the left shoulder had been temporary or permanently aggravated by the September 5, 2016 employment injury. On appeal counsel argues that Dr. D'Auria's report includes physical examination findings, including limited external rotation, that could be utilized in determining whether appellant has a left upper extremity impairment due to his accepted left shoulder condition.³ OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a district medical adviser (DMA) for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.⁴ Its procedures further provide that, if there is indication in the record of impairment, OWCP should refer the case to its DMA before denying a schedule award claim.⁵ In the instant case, a DMA has not reviewed Dr. D'Auria's May 31, 2019 report.⁶

OWCP issued FECA Bulletin No. 17-06 to explain the use of the DBI methodology *versus* the ROM methodology for rating of upper extremity impairments.⁷ Regarding the application of ROM or DBI impairment methodologies in rating permanent impairment of the upper extremities, FECA Bulletin No. 17-06 provides in pertinent part:

“Upon initial review of a referral for upper extremity impairment evaluation, the DMA should identify: (1) the methodology used by the rating physician (*i.e.*, DBI or ROM); and (2) whether the applicable tables in Chapter 15 of the [A.M.A.,] *Guides* identify a diagnosis that can alternatively be rated by ROM. If the [A.M.A.,] *Guides* allow for the use of both the DBI and ROM methods to calculate an impairment rating for the diagnosis in question, the method producing the higher rating should be used.”

Accordingly, the Board will remand the case to OWCP for further development. On remand, OWCP shall prepare an updated statement of accepted facts and refer the case file to a DMA for a reasoned opinion regarding the extent of appellant's permanent impairment of the left upper extremity. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision on appellant's schedule award claim.⁸

³ See *P.R. (N.R.)*, Docket No. 19-1313 (issued August 11, 2020).

⁴ Federal Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (March 2017). See also *P.W.*, Docket No. 19-1493 (issued August 12, 2020); *Frantz Ghassan*, 57 ECAB 349 (2006).

⁵ Federal (FECA) Procedure Manual, *id.*, at Chapter 2.808.6d (March 2017).

⁶ *M.D.*, Docket No. 20-0900 (issued August 31, 2021); *T.J.*, Docket No. 19-1656 (issued September 18, 2020); *M.R.*, *Order Remanding Case*, Docket No. 12-1932 (issued March 25, 2013); *M.R.*, *Order Remanding Case*, Docket No. 12-0914 (issued November 29, 2012); *J.T.*, *Order Remanding Case*, Docket No. 11-1934 (issued June 12, 2012).

⁷ FECA Bulletin No. 17-06 (May 8, 2017).

⁸ *Id.*

IT IS HEREBY ORDERED THAT the November 24, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this order of the Board.

Issued: January 14, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board